PRÊME COURT, U. S.

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Supreme Court of the United States

October Term, 1967

No. 1404

CLARK WALTER & SONS, INC.,

Appellant,

—vs.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees, Western Electric Company, Incorporated (hereinafter referred to as "Western Electric"), and American Telephone and Telegraph Company (hereinafter referred to as "A. T. & T.") move pursuant to Rule 16 of the Revised Rules of this Court (1) to dismiss this appeal on the ground that it is not within the jurisdiction of this Court, because not taken in conformity to statute, or, in the alternative, (2) to dismiss the appeal or affirm the Order of the United States District Court for the District of New Jersey because the question on which the decision of the cause depends is so unsubstantial as not to warrant further argument.

Questions Presented

1. Does the Expediting Act authorize a direct appeal to this Court from a District Court's denial of an application to intervene for the purpose of advancing private business interests?

2. Does one not a party to a government civil antitrust proceeding which results in a consent decree before any testimony has been taken have the right, long after the entry of that decree, to intervene purportedly to "enforce" such decree?

Statement

This purports to be a direct appeal pursuant to the Expediting Act of 1903 (15 U.S.C. § 29) from an Order entered in the United States District Court for the District of New Jersey denying the application of Clark Walter & Sons, Inc. (the Appellant herein) to intervene as a party plaintiff in a civil antitrust proceeding many years after the entry of a Consent Judgment. The suit was instituted by the United States of America against Western Electric and A. T. & T. on January 14, 1949. On January 24, 1956 it culminated in the entry of a Consent Judgment. The Appellant was never a party to the proceeding, and its application to intervene in the proceeding twelve (12) years after the entry of the Judgment and nineteen (19) years after the institution of the suit was found by the District Court to be without precedent and unwarranted.

The Complaint filed by the United States of America against Western Electric and A. T. & T. on January 14, 1949 alleged violations of Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1-3), and sought injunctive

relief under Section 4 of the Sherman Act (15 U.S.C. § 4). The defendants filed their Answer on April 27, 1949 denying the violations. The Final Judgment entered on January 24, 1956 recited, consonant with Section 5 of the Clayton Act (15 U.S.C. § 16), that it was entered on consent of the parties without trial or adjudication of any issues of fact or law, without constituting any evidence or admission by any party in respect of any such issues, and before any testimony was taken (JS* 6a).

The Judgment (JS 6a-27a) is complex and extensive. It contains numerous provisions dealing with a variety of matters, including the kinds of equipment which may be manufactured and the kinds of businesses which may be engaged in; distributorships; contractual relations with purchasers; acquisition of securities or assets; cost accounting methods; licensing of patents; acquisition or disposal of patents or patent rights; furnishing of technical information; and division of fields of manufacture, sale or distribution of equipment. It is significant that only in one specific area (not here involved) is a non-party permitted to invoke the jurisdiction of the District Court, *i.e.*, inability to reach agreement with respect to the licensing of patents or the furnishing of technical information and, then, only for the limited purpose of obtaining a judicial determination of reasonable royalties and other terms of a patent license agreement or reasonable charges payable under a technical information agreement. (Paragraphs X(B) and XIV(G)). In all other situations implementation as well as enforcement of the Judgment is left to the parties.

The Judgment (Paragraph XVII) provides for the retention of jurisdiction by the District Court to permit any of the parties—*i.e.*, the United States of America,

* Refers to Appellant's Jurisdictional Statement.

Western Electric or A. T. & T.—to apply to the District Court for the construction, enforcement, modification or termination of the Judgment, or the punishment of violations (JS 24a-25a):

> "Jurisdiction is retained for the purpose of enabling *any of the parties* to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or the modification or termination of any of the provisions thereof or for the enforcement of compliance therewith or for the punishment of violations thereof." (Emphasis supplied)

For purposes of securing compliance with the Judgment duly authorized representatives of the Department of Justice are permitted reasonable access to defendants' books and records and to interview their officers or employees; and information thus obtained is not to be divulged to anyone outside of the Department except in certain limited situations (Paragraph XVI at JS 24a).

The District Court denied the Appellant's application to intervene pointing out that "[T]his is an action which was commenced nineteen years ago and was settled by consent twelve years ago. A non-party to that action now seeks to reopen the case, and I do not think that it would serve the public interest to permit that" (JS 4a). The Court observed that but for *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Appellant "wouldn't have any grounds on which to argue" (Tr.* 2), and found that case "not in point from the

* Refers to transcript of February 26, 1968 hearing before the Court below.

ndpoint of facts" (JS 3a). He determined among other ngs that (JS 3a):

"• • • the weight of authority seems to be very strongly against allowing intervention in antitrust suits brought by the Government in the public interest. However, we have a little more than that type of situation here, from a factual standpoint. Here as distinguished from the El Paso case there was a consent decree. Considerable time has elapsed since the entry of that consent decree."

It is suggested in Appellant's Jurisdictional Statement t A. T. & T. and its operating subsidiaries have vioed the Judgment, and that the District Court found h a violation. Thus it is stated that the "affidavits subtted by Clark Walter in support of intervention were contravened by the other parties" (JS 3). As a re- t Appellant would have this Court believe that "in 7, New Jersey Bell re-entered the private communicans business" (JS 4); and that "A. T. & T. is currently contempt, no tariff for the Hospital Interphone ever ving been filed by New Jersey Bell" (JS 6). These tements, apparently derived from an allegation made y "on information and belief", are not only erroneous, y represent a complete reversal of the Appellant's ition below.

n its brief filed with and in support of its moving ers below, Appellant asserted that it "does not at this e set forth its position on the merits"; that the "issue ore the District Court at this time is not whether apant is correct in its allegation that defendants are lating the consent decree"; and that "only the right the applicant to intervene" was involved. In their wering brief Western Electric and A. T. & T., while

"vigorously disput[ing] any suggestion that defendants have violated the Judgment", agreed "that to argue the merits at this time would constitute an unwarranted imposition upon this [District] Court". In its reply brief the Appellant re-confirmed its prior position, asserting that "the sole question currently confronting this Court is whether applicant satisfies the criteria of Rule 24" and reiterating that "this motion is not the proper occasion for an argument on the merits". And at the oral argument below Appellant's counsel advised the Court, "I am not asking you to rule on the merits" (Tr. 18).

In deciding the case, the Court below did not find (as the Appellant represents) that the Appellant's moving papers established a violation of the decree (JS 6, 10). Indeed the Court made it clear that it was not expressing "any opinion as far as the merits are concerned" (JS 3a), and specifically stated that "I can't reach [the] conclusion" that there was a violation of the decree, and that "I am not reaching the merits" (Tr. 18).

The case below then was presented by the Appellant on one basis, and answered by the Appellees and decided by the District Court on that basis. The mercurial efforts of Appellant to inject the merits into these proceedings for the first time on this appeal are improper.

ARGUMENT

POINT I

The Appeal Should Be Dismissed Because the Expediting Act Does Not Confer Jurisdiction on This Court in This Case.

This direct appeal from a District Court order has improperly been filed in this Court. The purpose of the Expediting Act, pursuant to which the appeal purports to have been brought, is to provide for direct review by this Court of issues of "great and general importance". 36 Cong. Rec. 1679 (1903). It is not applicable where, as here, a non-party seeks to advance its private business interests.

In *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963), *mod. on rehearing*, 375 U.S. 994 (1964), where an earlier consent decree in a civil antitrust suit brought by the government had established machinery for court supervision of the issuance of certain copyright licenses by ASCAP, petitioners sought an order directing ASCAP to issue a particular type of license. The District Court held that the decree did not authorize it to compel the issuance of the particular type of license which petitioners sought. *United States* v. *ASCAP*, 208 F. Supp. 896 (S.D.N.Y. 1962). Shenandoah filed parallel appeals to the Second Circuit and to this Court. This Court dismissed the appeal for lack of jurisdiction (*Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 371 U.S. 540 (1963) (*per curiam*)), and the Second Circuit dismissed the appeal before it, also for lack of jurisdiction, on the ground that the Expediting Act provided the sole means of appeal (*United States* v. *ASCAP*, 317 F.2d 90 (2d Cir. 1963)). On petition for a writ of certiorari, this Court reversed,

holding that the Expediting Act did not apply under the circumstances (375 U.S. at p. 40):

> "The dismissal that we heretofore entered was based on our unexpressed view that the appeal from an ancillary order of this type was not within the Expediting Act. Direct appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party. [Citations omitted.] The controversy which is disposed of by the District Court's order is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned."

To the same effect are *United States* v. *ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied sub nom. Metromedia, Inc.* v. *ASCAP*, 382 U.S. 877 (1965), and *Metromedia, Inc.* v. *ASCAP*, 382 U.S. 38 (1965) dismissing *per curiam* a parallel appeal from the District Court.

These authorities establish the principle that private and ancillary interests, although arising in the framework of a government civil antitrust suit, are not to be given extraordinary appellate treatment under the Expediting Act. That principle is plainly applicable to the instant case.

Only two appeals have been found which purported to have been brought under the Expediting Act, involving attempted intervention under Rule 24 by a private appellant to "enforce", for the benefit of its own interests, a decree entered in a government antitrust suit. *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457 (1967); *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960). In *Westinghouse*, the District Court denied a

motion to intervene alleging violation of a consent judgment. *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (D.C. Pa. 1960). *Lupton* involved the denial of a similar motion alleging violation of a litigated judgment. *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (D.C. Mo. 1967). In both cases this Court dismissed the appeals *per curiam*. It is submitted that this Court should do likewise in this case.

POINT II

The Judgment Below Should Be Affirmed or the Appeal Dismissed Because the Appellant Clearly Had No Right to Intervene and the Question Presented by the Appeal Is So Unsubstantial as Not to Require Further Argument.

A. One Not a Party to a Civil Proceeding Initiated by the Government for Enforcement of the Antitrust Laws and Which Results in a Consent Decree Before Any Testimony Has Been Taken, Does Not Have the Right, Many Years After the Entry of That Decree, to Intervene In Such Proceeding to Assert That Such Decree Has Not Been Complied With.

Rule 24 conditions intervention of right* upon a showing that the applicant is "so situated that the *dispo-*

* We do not understand the Appellant to suggest that the District Court abused its discretion in not granting permissive intervention. Rule 24(b) provides that "anyone may be permitted to intervene in an action . . . when an applicant's claim . . . and the main action have a question of law or fact in common". However, the Appellant's claim in an independent suit would have to be that the alleged conduct of the defendants violates the antitrust laws; it could not claim that such conduct violated the consent decree of the District Court, as it asserts in this proceeding. (15 U.S.C. § 16) In the one case the question is whether conduct is inconsistent with a statute; in the other case the question is whether conduct is inconsistent with a decree. These questions do not involve common questions of law or fact.

sition of the action may as a practical matter *impair or impede* his ability to protect" an interest relating to the property or transaction which is the subject of the action. The Rule clearly requires timely intervention prior to *"disposition"*, that is, entry of Judgment. However, in this case the action has long since (twelve years ago) been disposed of by Judgment. The Appellant was in no way *"impaired or impeded"* by such disposition in its ability to pursue its remedies under 15 U.S.C. § 15 or § 26. Those remedies are still available today.

It is worthy of note that the Appellant does not cite a single case for the proposition that intervention is available *after the entry* of a consent judgment entitled to the protection of the proviso of Section 5 of the Clayton Act (15 U.S.C. § 16). The Consent Judgment in these proceedings clearly falls within the scope of that proviso:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* * * *." (Emphasis supplied)

Congress has made clear that the purpose of the proviso is to encourage defendants to settle cases instituted by

the Government before trial. Sen. Doc. 584, 63rd Cong., 2nd Sess., p. 6, 51 Cong. Rec. 15638, 15824, 15825, 16276. The Consent Decree process is essential to antitrust enforcement. During recent years between 70% and 80% of the antitrust injunctive suits brought by the Department of Justice have been terminated by consent decrees. Note, 81 Harv. L. Rev. 69, 224 (1967); Hearings on S. 2512 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pp. 86-87.

It is clear that the Appellant is precluded from suing on the Consent Judgment for treble damages (15 U.S.C. § 15), or injunctive relief (15 U.S.C. § 26). Its application to intervene in these proceedings was an attempt to accomplish by indirection what it was prevented by explicit legislation from doing directly.

The Consent Judgment entered in this case in 1956 permits *"any of the parties"* to apply to enforce its provisions. What the Appellant sought below was to intervene to modify the terms of the Judgment, so as to permit one (with an alleged grievance) who was *not* a party to seek to enforce it. Such a possibility was clearly not within the contemplation of the parties or the District Court when the Judgment was entered in 1956.

The reasoning of the Second Circuit in *United States* v. *ASCAP*, 341 F.2d 1003 (2d Cir. 1965), *cert. denied sub nom. Metromedia, Inc.* v. *ASCAP*, 382 U.S. 877 (1965) is dispositive of the application to intervene in this case. In that case Metromedia, Inc., a radio broadcaster, sought to punish ASCAP for contempt by reason of an alleged violation of a consent judgment entered in a prior government antitrust suit against ASCAP, to which Metromedia was not a party. The District Court dismissed the

proceeding on the ground that Metromedia did not have standing to bring it.

In affirming, the Second Circuit said (341 F.2d at pp. 1007-08):

"• • • [W]e hold that Metromedia lacks standing to move in this government antitrust action to punish the defendant ASCAP for contempt. Metromedia is not a party to the action and, indeed, could not have intervened as of right.

• • • • •

"• • • [T]he government is the sole proper party to seek enforcement of government antitrust decrees. The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. *Thus, the fact that the court retains jurisdiction in an antitrust action does not mean, unless the decree should expressly provide otherwise, that persons affected by the judgment, but not parties to it, can invoke the court's jurisdiction to alter or enforce the terms of the decree.*

"Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights." (Emphasis supplied)

To permit the Appellant to assert private rights under the 1956 Consent Judgment would, as pointed out in *United States* v. *Bendix Home Appliances, Inc.*, 10 F.R.D. 73, 77 (S.D.N.Y. 1949), "tend to defeat the policy behind the distinction drawn by Section 16 between litigated decrees and consent decrees." To allow intervention by a non-party, as in the instant case, "would be to disregard the intentions of the parties when they consented to the decree and asked the approval of this Court". *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (D.C. Pa. 1960), *appeal dismissed per curiam, sub nom. Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518 (1960).*

B. The *El Paso Natural Gas* Case, Upon Which Appellant Relies, Is Not Apposite.

Appellant's primary reliance on this appeal (as it was below) upon this Court's opinion in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) is completely unwarranted. *El Paso* was a case of unique facts entirely dissimilar in all material respects to the present proceeding. It involved intervention (1) prior to judgment (not twelve years later), (2) for the purpose of assisting the court in formulating (rather than "enforcing") the judgment, (3) subsequent to the mandate of

* Even in the case of a litigated judgment entered in an antitrust suit instituted by the government it has long been held that third parties may not sue on the judgment, but must proceed with their remedies under the antitrust statutes. Were it otherwise such a judgment would constitute conclusive evidence against a defendant rather than *prima facie* evidence, as provided in § 5(a) of the Clayton Act. *Ida Amusement Corp.* v. *RKO Pictures Corp.*, 1954 Trade Cas. para. 67,837 (S.D.N.Y. 1954) and *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002 (S.D.N.Y. 1948). *A fortiori* a third party should not be permitted through the vehicle of intervention to constitute a consent judgment conclusive evidence against a defendant.

this Court, which had not been obeyed, ordering divestiture after a full trial of the issues (rather than solely upon consent of the parties without trial or adjudication of any issue of fact or law).

Nothing in *El Paso* expressly or by implication overrules the line of cases (pp. 11-13, *supra*) which have, without exception, denied intervention after the entry of a consent judgment in a Government antitrust suit.

Nevertheless, the Appellant suggests that there may be confusion as to the scope of the *El Paso* case, and points to the unreported decision of the Hon. Sylvester J. Ryan in the Southern District of New York, *New Jersey Communications Corp., et al.* v. *American Telephone and Telegraph Company, et al.*, 67 Civil 3632 (S.D.N.Y., Dec. 8, 1967). It is suggested that that case held that "Rule 24 authorized intervention by private parties seeking to enforce consent decrees". The *New Jersey Communications Corp.* suit had been initiated by various companies in the private communications field and their trade association to have the Consent Judgment filed in the Court below construed and enforced by the United States District Court for the Southern District of New York. Judge Ryan summarily dismissed the Complaint for lack of jurisdiction over the subject matter. In the process, by way of dictum, he observed that the dismissal would not leave plaintiffs without an alternative since they could bring an independent action under the antitrust laws or apply to intervene in the Court below, citing as authority the *El Paso* case. The question of the right of the *New Jersey Communications Corp.* plaintiffs to intervene in the Court below was not, of course, before Judge Ryan, and was unnecessary to his decision. Judge Ryan did not purport to decide the right to intervene in these proceedings, leaving to the United States District Court for the District

of New Jersey the decision on such an application. Appellant's effort to elevate Judge Ryan's passing dictum to the status of a "conflicting * * * decision" constitutes an imposition upon this Court.

At least four cases decided since *El Paso* have indicated that it is limited to its unique circumstances, and have denied Rule 24 intervention by a private party in a Government-instituted antitrust proceeding particularly where, as here, remedies adequate to protect the applicant's private interest are available. *United States* v. *Aluminum Co. of America*, 41 F.R.D. 342 (D.C. Mo. 1967), *appeal dismissed per curiam, sub nom. Lupton Mfg. Co.* v. *United States*, 388 U.S. 457 (1967); *United States* v. *Blue Chip Stamp Company*, 272 F. Supp. 432 (D.C. Cal. 1967), *aff'd per curiam, sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968); *City of New York* v. *United States* (N.D. Ill., Nov. 27, 1967), *aff'd per curiam* (No. 1141), 36 U.S.L.W. 3371, 3404 (Sup. Ct., April 22, 1968); and *School District of Philadelphia* v. *United States* (N.D. Ill., Nov. 27, 1967), *aff'd per curiam* (No. 1146), 36 U.S.L.W. 3371, 3404 (Sup. Ct., April 22, 1968).

In the *Aluminum Co.* case, an application was made, as here, by an alleged competitor for leave to intervene and for an order to show cause why the defendant should not be adjudged to have violated provisions of the final judgment, entered after full trial of the issues several years before, requiring independent operations by Alcoa and its subsidiary. The District Court denied intervention citing the "considerable authority to support the view that no one other than the government should be permitted" to intervene in antitrust litigation instituted by the Government after the entry of judgment. 41 F.R.D. at 344. The decision of the Court was rendered approximately a month

before this Court's opinion in *El Paso*. Thereafter, on appeal and subsequent to its disposition of the *El Paso* case, this Court dismissed the *Aluminum Co.* appeal *per curiam*.

United States v. *Blue Chip Stamp Company, supra,* involved a consent decree. In denying a motion to intervene to attack the decree, the District Court distinguished the *El Paso* case on the grounds that in *El Paso* the motion to intervene was made *before* the entry of the judgment, and stated that "*El Paso* cannot be taken as authority for the proposition that intervention may be permitted *after* entry of a consent decree." 272 F. Supp. at 437 (Emphasis supplied). This Court affirmed *per curiam*.

Finally in *City of New York* v. *United States* and *School District of Philadelphia* v. *United States,* the District Court for the Northern District of Illinois ruled that state and local governments as purchasers of children's books had no right to intervene under Rule 24 in order to oppose entry of a proposed consent decree in a government antitrust suit charging publishers with price fixing conspiracies. This Court likewise affirmed *per curiam*.

For the reasons stated above, the District Court was clearly correct in its determination that Rule 24 may not be utilized to subvert the protection afforded by statute to the parties to a consent decree entered before the taking of testimony and without trial or adjudication of any issue of fact or law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed on the ground that it is not within the jurisdiction of this Court, because not taken in conformity to statute, or, in the alternative, that the appeal should be dismissed or the Order of the District Court for the District of New Jersey should be affirmed, because the question involved is so unsubstantial as not to warrant further argument.

Respectfully submitted,

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Dated: June 6, 1968.